IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 19TH DECEMBER 2007 / 28TH AGRAHAYANA 1929

FAO.No. 94 of 2005()

AGAINST THE ORDER DATED 19/10/2004 IN IA.2316/03, 2317/03 IN AS.73/2002 of ADDL.DISTRICT COURT, KOZHIKODE

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APPELLANT/PETITIONER

MOOTHORAN, AGED 61 YEARS, S/O.KANNAN,
NALLIYATTA PARAMBIL LANE,
BEHIND PREETHI THEATRE, FEROKE AMSOM AND DESOM,
KOZHIKODE THALUK.

BY ADV. SRI.MANJERI SUNDERRAJ
SRI.B.PREMNATH (E)

RESPONDENTS: RESPONDENTS

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1. RATTI, AGED 65 YEARS,
D/O.KANNAN, W/O.KUNHATHAN, POOLAKKAL HOUSE,
NADUVATTOM AMSOM AND DESOM, KOZHIKODE THALUK.

2. KAMALA, AGED 30 YEARS,
D/O.LATE RARUKUTTY, W/O.KARIYATHAN,
EDATHILTHODI THAZHE PARAMBA, NADUVATTOM AMSOM
AND DESOM, KOZHIKODE TALUK.

3. VALLY, AGED 35 YEARS,
D/O.LATE RARUKUTY, W/O.SEKHARAN, EDATHILTHODI
THAZHE PARAMBA, NADUVATTOM AMSOM AND DESOM,
KOZHIKODE TALUK.

4. MANOHARAN, AGED 27 YEARS,
S/O.LATE RARUKUTTY, EDATHILTHODI THAZHE PARAMBA,
NADUVATTOM AMSOM AND DESOM, KOZHIKODE.

BY ADV. SRI.P.K.RAMKUMAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 19/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

F.A.O.No.94 of 2005

Dated this the 19th December, 2007.

J U D G M E N T

This appeal is filed against an order passed by the lower appellate court dismissing four applications, filed for condoning the delay in filing the restoration petition to restore the appeal, for condoning the delay in filing I.A.No.817/2002 and also for restoring I.A.No.817/2002, which was dismissed for default on 18.12.2002. The appellant filed the suit for partition. The suit was dismissed. Challenging the decree and judgment passed in the suit, appellant filed A.S.No.73/2002. There was delay of 17 days in filing the appeal. So, the appellant filed I.A.No.817/2002 for condoning the delay. On 18.12.2002, petition to condone the delay was dismissed for default. Consequently, the appeal was also dismissed for default. Appellant filed I.A.No.2318/2003 to condone the delay in filing the petition to restore I.A.No.817/2002. He filed I.A.No.2319/2003 for restoring the I.A.No.817/2002, which was dismissed for default. Appellant filed I.A.No.2316/2003 to condone the delay in filing the petition to restore the appeal to file. He filed I.A.No.2317/2003 to restore the appeal which was dismissed for default. The lower appellate court considered

all the four applications together and held that the appellant had failed to offer any valid reason for condoning the delay of filing the petition to restore the delay petition as well as the appeal and dismissed those applications. Consequently, the petitions filed to restore the appeal as well as petition to condone the delay were also dismissed. Challenging those orders, this F.A.O. is filed.

2. In the affidavit filed in support of the petition to condone the delay, the case put forward by the appellant was that after the dismissal of the delay petition in the appeal, he entrusted the case bundle and the impugned orders with an advocate at Ernakulam for filing the appeals, and the lawyer returned the case file after nine months and 24 days, with an advice that the remedy available to the appellant was to file petitions for restoration before the lower appellate court itself. It is true that the appellant had not produced any material to show that he consulted any lawyer at Ernakulam and the lawyer was keeping the bundle for about nine months and 24 days. So, as rightly observed by the appellate court, that observation appears to be not convincing. But considering all aspects of the matter, I am of the view that another opportunity can be granted to the appellant to prosecute the appeal. So, for that purpose, the

petitions to restore the delay petition and appeal, after condoning the delay, in those petitions are to be allowed. But that can be only on payment of a heavy cost of Rs.2000/= .

In the result, appeal is disposed of in the following manner. I.A.No.2316/2003 and I.A.No.2318/2003 will stand allowed, provided the appellant pays a cost of Rs.2000/= within one month from today. If the condition is complied with, I.A.No.2317/2007 filed for restoring the appeal and I.A.No.2319/2007 for restoring I.A.No.817/2002 shall also stand allowed, in which case, the lower appellate court shall take back I.A.No.817/2002 and A.S.No.73/2002 back to file and dispose of the same, afresh in accordance with law, with due notice to respondents. The cost shall be paid within one month from today.

Post after a month for reporting the compliance.

K.PADMANABHAN NAIR,
JUDGE

nj.